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No.

In the Supreme Court of the United States

DENNIS EDWARD COLLIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

WHETHER A TRIAL COURT'S FINDING THAT AN AIRPORT ENCOUNTER CONSTITUTED AN UNREASONABLE FOURTH AMENDMENT "SEIZURE" IS PROPERLY REVERSED WHERE THE TRIAL JUDGE FOUND THAT THE PERSON ACCOSTED BY THE AGENTS REASONABLY BELIEVED THAT HE WAS NOT FREE TO LEAVE, AND WHERE THE REVIEWING COURT DID NOT FIND THE TRIAL JUDGE'S FACTUAL FINDINGS TO BE "CLEARLY ERRONEOUS," BUT HELD THAT "AS A MATTER OF LAW" THE ENCOUNTER "DID NOT AMOUNT TO A SEIZURE?"

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OPINION BELOW

The opinion of the Trial Court suppressing evidence is attached hereto as appendix A. The opinion of the Sixth Circuit Court of Appeals is set forth as appendix B.

JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals reversing the Trial Court's Order suppressing evidence was entered on February 16, 1983. This Court's jurisdiction to review the decision of the Court of Appeals by writ of certiorari is invoked under 28 USC §1254(1).

PROVISIONS OF LAW INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

No.

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DENNIS EDWARD COLLIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On June 4, 1981, the Petitioner was arrested by Drug Enforcement Agents Anderson and Demmink, at the Detroit Metropolitan Airport, and charged by way of complaint with posession with the intent to distribute cocaine. On July 9, 1981, a one count indictment was returned against him, containing this same charge and growing out of the June 4 arrest. The case was duly assigned to the Honorable Julian Abele Cook Jr., U.S. District Judge of the Eastern District of Michigan, and the petitioner filed a pretrial motion to suppress the evidence upon which the prosecution was premised, on the basis that it was acquired by the government through an unlawful search and seizure of the defendant's person and personal effects. The hearing on the motion to suppress was held on October 14, 1981, and continued on to October 19, 1981. Both of the agents who effected the arrest of the petitioner gave testimony as did the petitioner himself.

Basically, Special Agent Anderson's testimony reflects that during the morning of June 4 (a weekday) he and Special Agent Demmink were, as part of their duties in connection with the Drug Enforcement Administration's Drug Interdiction Program at Detroit Metropolitan Airport, watching the passengers arriving on Delta Airlines Flight 1132. (1 TR, 11-12; 2TR 63)* Special Agent Anderson's attention was, as he testified, attracted to the petitioner, who was the first passenger to leave the plane, and who proceeded to walk quickly from the gate carrying a shoulder bag. (1 TR, 17-18). Agent Anderson followed him up the concourse in a similarly hurried manner, and, according to his testimony, the petitioner on two or three occasions turned and looked at the following agent, and continued walking. (1 TR 20)

While Agent Anderson indicated that this behavior, together with the fact that the petitioner did not, in Anderson's opinion, appear to be dressed as a "business man" — the assumed ordinary occupant of a first class seat on an airplane — and appeared to have been "up all night," nonetheless Anderson testified that he did not decide to approach the petitioner until, in the baggage claim area, he appeared to make eye contact and to nod to another person who was sitting near the baggage conveyor. (1 TR 18, 20-21; 2 TR 13-14). After the petitioner appeared, to the agent, to nod to the second individual, the two left the baggage claim area by separate doors. (1 TR 21) Anderson followed the petitioner outside, and to the left, and saw a second person standing by an automobile, also to the left of the door through which the petitioner exited, and called out to the petitioner, showed him his badge and indicated that he wanted to ask the petitioner some questions. (1 TR 23-24; 2 TR 16)

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*References to the evidentiary hearing transcript are designated by the volume number (1 or 2), followed by the legent "TR" and the page number within the particular volume.

Special Agent Anderson asked the petitioner for identification in order to determine, according to his testimony, whether the petitioner was travelling under his real name, or under an alias, which would have been of some apparent significance to the agent. (1 TR 24; 2 TR 35) The petitioner showed a Master Charge card in the name of Dennis Collis, which, according to Special Agent Anderson, was not in itself suspicious, but Anderson nonetheless asked him if he had a "more legitimate" form of identification. (1 TR 24; 2 TR 36) Anderson also asked to see petitioner's airline ticket, which he showed to him, and which also bore the name Dennis Collis. (1 TR 24) Noticing the presence of a baggage claim check in the petitioner's ticket envelope, Anderson inquired if the petitioner had any checked baggage; the petitioner indicated that he did, and that he had come outside of the terminal to look for his brother, who was to pick him up. (1 TR 25) Special Agent Anderson then inquired whether the person standing by the car was his brother, and the petitioner indicated that he had never seen the person before. (*Ibid.*) Special Agent Anderson then asked again for a "better form of identification," and the defendant indicated that he might have a driver's license in his checked luggage. (*Ibid.*)

Throughout this interchange, according to Special Agent Anderson, the petitioner appeared nervous, and repeatedly inquired as to what the "problem" might be. While petitioner testified that Special Agent Anderson's response to these inquiries was simply that he wanted petitioner to "wait for his partner" to arrive, Special Agent Anderson denied making reference to the imminent arrival of Special Agent Demmink, but did not specifically indicate what response, if any, he gave to the inquiry, other than identifying himself as a federal "narcotics agent." (1 TR 26; 2 TR 84-85)

Special Agent Anderson asked the petitioner to come inside the terminal, claim the checked baggage and get his driver's

license to show to the agents; he did not claim to recall what the petitioner's vocal response to this question was, but, in any event, petitioner did return to the baggage claim area, as did Special Agent Anderson. (1 TR 26-28; 2 TR 40) After Anderson and the petitioner returned to the baggage claim area, Special Agent Demmink arrived, as did the person who had been standing by the automobile. (1 TR 29) Anderson explained to Demmink what had transpired, and directed his attention to the second person. (TR 29-30; 2 TR 65-66) While the petitioner was standing by the baggage claim area, and Anderson standing next to him, the other person approached the group. (1 TR 30) Special Agent Demmink asked the other person who he was, and he replied that he was a friend of the petitioner; he then took the shoulder bag which petitioner had been carrying throughout the series of events referred to above from petitioner's shoulder, and Demmink, saying "wait a minute," took the bag from the other person, telling him that they had some questions they wanted to ask petitioner; petitioner then took the bag back from Demmink. (*Ibid.*)

Anderson asked the petitioner whether the other person was his brother, but received no response. Petitioner began pacing back and forth by the baggage conveyor. (1 TR 31) Suspicious that he might attempt to leave, Anderson positioned himself between the petitioner and the exit door, so as to cut off his escape route. (*Ibid.*) After walking back and forth by the baggage conveyor several times, the petitioner broke and ran out the door, with Anderson and Demmink in pursuit. (1 TR 31-32) He ran into a parking lot area and threw the shoulder bag over a cyclone fence which separated the parking lot from the airfield proper. (1 TR 32) The agents caught up with the petitioner placed him under arrest, and, with the help of Delta Airlines employees retrieved the bag from the airfield. (1 TR 32-22) The bag was later found to contain cocaine.

The petitioner's testimony was basically consistent with that of the agents, although he testified that when Anderson first approached him, the agent touched him on the arm as he showed him his badge and asked for his identification. (2 TR 83-84) (Anderson on the other hand, denied touching him.) (2 TR 21) Petitioner also testified that "it was obvious" that he did not have a choice as to whether or not he would answer the agent's questions, show the agent his identification, or, ultimately, accompany the agent back inside to the baggage claim area. (2 TR 85-86) This testimony was apparently credited by the trial court, because Judge Cook ultimately held that the petitioner had been "seized" unlawfully when first approached by Anderson outside the terminal and that the "defendant's belief that he was not free to leave when approached by Anderson, and that he was not free to refuse to answer the agent's questions, were reasonable beliefs which are held by reasonable citizens under these circumstances." (Slip Opinion, pp. 8-9)

The trial judge wrote:

> "[T]he Court is of the opinion that from the moment Anderson identified himself with a display of credentials and began to ask questions of Defendant outside of the terminal, a Terry [v. Ohio, 392 U.S. 1 (1968)] "stop" had been effected. Defendant could have ignored Anderson, or espressed his belief that he did not have to respond to questions. As Judge Pratt noted in [United States v.] Coleman, [450 F.Supp. 433, 439 (E.D. Mich. 1978)], however, "such conduct ... would have been, at the very least, a breach of etiquette, an act of discourtesy and incivility which would not be expected of the ordinary, reasonable person innocent of crime."

The government appealed, and the Sixth Circuit Court of Appeals in an opinion issued February 16, 1983, reversed (see Appendix A). The Sixth Circuit held that the "trial court, in effect, imposed a per se rule declaring every contact between a citizen and law enforcement officer a 'seizure'." *United States* v. *Collis*, _____ F2d _____ (6th Cir., No. 82-1127, February 16, 1983) Slip Opinion, p. 5. The Court went on to hold that the initial encounter between petitioner and Agent Anderson "*as a matter of law*" did not "amount to a seizure." Slip Opinion, p. 6 (emphasis in original)

Petitioner thereupon filed this Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

The trial court applied a proper legal standard in its decision of the motion to suppress evidence, and premised its decision upon essentially factual findings which the Court of Appeals did not hold clearly erroneous; rather, the Court of Appeals declaration that the encounter between the petitioner and the DEA Agents did not amount to a seizure "as a matter of law" flies in the face of clear pronouncements from this Court regarding the essentially factual nature of the question of whether a Fourth Amendment "seizure" has occurred, and bespeaks a need for guidance from this Court as to the nature of the concept of a "seizure" and the proper mode and standard of review of trial court suppression orders.

The question upon which the instant case was resolved in the court below was whether or not the petitioner was "seized" in a Fourth Amendment sense, when first approached by Special Agent Anderson outside the baggage claim area. The trial judge found that he was. In so doing, he promoted the standard enunciated by Justice Stewart in *United States* v. *Mendenhall*, 446 US 544, 554-55 (1980):

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [Citations and footnote omitted]

The trial judge did not purport to hold that any time an agent approaches an individual and asks to speak to him, a Fourth Amendment "seizure" has occurred. Rather, he found that the petitioner *in fact* did not believe that he was free to leave, and that, in light of all the attendant circumstances as disclosed by the testimony which the trial court heard and evaluated, such a belief was reasonable. In coming to this conclusions, the trial judge heard conflicting testimony, and engaged in fact finding, and an evaluation of the totality of the circumstances — a task which it is uniquely the perogative of a trial court, rather than an appellate court to engage in, and which a trial judge, having heard and seen the witnesses testify, rather than being confined to a review of a printed record, is uniquely in a position to effectively undertake.

The significance of the fact finding component of the trial court's determination in the case at bar cannot be gainsaid. This was not a case in which, for example, a trial judge made conclusions based upon a stipulated, or completely agreed-to set of facts — rather, the trial judge was faced with testimony that conflicted in a number of regards, and his final determination that the defendant reasonably felt that he was retained in

his liberty was an obvious product of the resolution of a number of these conflicts in the testimony. Thus, for example, while Special Agent Anderson testified that he did not touch the defendant when he first approached him outside the terminal (2 TR 21), the petitioner testified that he in fact did touch him (2 TR 83), and the trial judge apparently determined to credit the petitioner's testimony and reject the testimony of the agent, because he found specifically that Anderson touched the defendant in order to gain his attention. (Slip Opinion, p. 2) Similarly, the court apparently credited the petitioner's testimony that he believed "that he was not free to leave when approached by Anderson, and that he was not free to refuse to answer the agent's questions," (Slip Opinion, p. 9) also a matter of pure fact finding, based upon the trial court's ability to observe and judge the demeanor and credibility of the petitioner as witness.

Whether this Court, or any of its members, would have similarly viewed the testimony, had it had the opportunity to hear it, is of course not the question. Rather, the issue is whether this Court can accept the government's essentially factual arguments and overturn, on the basis of the record alone, and absent any suggestion that the trial court did not adequately understand or follow the governing legal principles, a decision which "must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Commissioner* v. *Duberstein*, 363 US 278, 289 (1960).

In concluding and holding that the trial judge "in effect imposed a per se rule" the court of Appeals misapprehended both the nature of the ruling of the trial judge and the nature of the question of whether a Fourth Amendment seizure has occurred. The degree of the Court of Appeals' misapprehension of the trial court's opinion is underscored by its later pronouncement that "nothing in the lower court's findings

would indicate that a reasonable person under similar circumstances would not have felt free to ignore Anderson and proceed on his way." (Slip Opinion, p. 7) In fact, the trial judge expressly *held* that:

> "Defendant's belief that he was not free to leave when approached by Anderson, and that he was not free to refuse to answer the agent's questions, were reasonable beliefs *which are held* by reasonable citizens under these circumstances." (Slip Opinion, pp. 8-9) (Emphasis supplied)

But, as noted above, the Court of Appeals did more than merely misapprehend the nature of the trial court's decision; it misapprehended the essentially factual nature of the question as to whether a Fourth Amendment seizure has occurred. No where is this illustrated better than by the panels pronouncement that *"as a matter of law"* the original encounter in the instant case "did not amount to a seizure." (Slip Opinion, p. 6)

The essentially factual nature of the inquiry is well established in the case law. Thus, as the Seventh Circuit put the matter in *United States* v. *Black*, F2d , 31 Cr L Reporter 2113, 2114 (7th Cir. 1982):

> [T]he question is a highly factual one, heavily dependent upon the circumstances of each case . . . Our standard of review is accordingly limited to inquiry into whether the decision of the district court is clearly erroneous.

Or, in the words of Ninth Circuit, in *United States* v. *Patino*, 649 F2d 724, 727 (9th Cir. 1981):

> This is largely a factual inquiry dependent upon the totality of the circumstances and we will defer to the

finding of the district court unless it is clearly erroneous.

This appears to have been the standard which was adopted by the majority of this Court in *Florida* v. *Royer*, US (80-2146, decided March 23, 1983).

The government never argued that the trial judge implied an improper standard of law in the instant case, and indeed the Sixth Circuit, in its opinion, noted that Judge Cook employed "the appropriate test for determining a 'seizure'." (Slip Opinion, p. 4)

The trial judge proceeded to make findings of fact. Initially, he determined that, notwithstanding Agent Anderson's denial, Anderson did in fact initiate an encounter with petitioner by touching him on the arm, and he credited the defendant's testimony that he did not believe that he was free to leave, and was not free to refuse to answer questions. Finally, he held that under all of the circumstances which he found to exist, the petitioner's belief that he was not free to leave and was not free to refuse to answer questions "were reasonable beliefs which are held by reasonable citizens *under these circumstances.*" (Opinion of Trial Court, pp. 8-9) (Emphasis added) The "circumstances" of course, included the totality of circumstances which the trial court found to have existed, given the totality of the testimony which the trial court heard and weighed. The Sixth Circuit, however, held that the trial court "in effect, imposed a per se ruling declaring every contact between a citizen and law enforcement officer a 'seizure'." (Slip Opinion, p. 5) The Sixth Circuit was clearly wrong in this conclusion.

The Court of Appeals did not hold that any of the trial judge's findings were "clearly erroneous" as matters of fact; indeed, rather than being clearly erroneous, Judge Cook's findings in the instant case are eminently reasonable,

eminently well supported by the evidence, and focus on the kinds of factual information which the developing case law regarding airport encounters has suggested are appropriately considered. Thus, for example, the former Fifth Circuit noted in *United States* v. *Berry*, 670 F2d 583, 595 (5th Cir., 1982) the "display of official authority beyond a statement that the person stopping an individual is a law enforcement officer," and the fact that the interference with a person's progress on his way, both suggest that an airport stop has gone beyond the stage of being "non-coercive" and has in fact become a Fourth Amendment "seizure."

Both of these factors were present in the case at bar, as well as the fact that the agent was found by the trial judge (notwithstanding his denials under oath) to have actually touched the petitioner in order to initiate their conversation. While the petitioner did not claim that he was pushed, shoved or physically turned, nonetheless, the fact that the trial court did find that the agent made physical contact with the petitioner is not without significance. It certainly requires no stretch of the imagination to conclude that the presumption of air of authority which is involved in an agent simultaneously displaying his official credential and placing his hand upon a citizen, who is at the moment walking along in a public place, suggests an air of purpose or authority which is somewhat removed from a mere casual encounter, and might when viewed in the totality of the circumstances, contribute to a reasonable finding that the petitioner felt himself to have been restrained of his liberty, and that such a belief was reasonable. Indeed, Justice Stewart himself noted in *United States* v. *Mendenhall*, that "some physical touching of the person of the citizen" is a factor which is appropriately considered in determining whether "compliance with the officer's request might be compelled" and whether a seizure, in Fourth Amendment terms, has occurred. 446 US *supra* at 554.

It should be noted that no one fact or factor, or the absence of any fact or factor, can be held to be dispositive of the question of whether or not a "seizure" has occurred. It is, rather, the totality of the circumstances which must control. It is not the fact that Anderson touched the petitioner on his arm, or the fact that he immediately asked for identification, or the fact that he refused to answer the petitioner's repeated inquiries regarding what the "problem" was (see Trial Court's Opinion, p. 2), which, taken individually renders the contact between Anderson and Collis a "seizure" or supports the trial court's determination that the petitioner did not reasonably believe himself free to leave. Rather, it is the totality of circumstances upon which the trial court's findings rest, and it is for this reason, and the trial court's superior ability to evaluate the totality of circumstances based upon its opportunity to hear and see the witnesses testify, that the Court of Appeals holding that no seizure occured "as a matter of law" must be reversed.

As this Court noted in *Terry* v. *Ohio*, 392 US 1, 13 (1968): "street encounters between citizens and police officers are incredibly rich in diversity," and, in recognizing what is essentially a factual test based upon the totality of the circumstances in an individual case for whether or not such an encounter constitutes a Fourth Amendment "seizure," the courts have manifestly eschewed a "bright line" determination. Judge Cook did not, in the instant case, adopt an impermissible *per se* rule; rather, he made precisely the kind of factual determination which the case law requires, and that determination is entitled to precisely the same kind of deference that any essentially factual finding by a trial judge is. *E.G. United States* v. *Kendall*,, 655 F2d 199, 203 (9th Cir. 1981).

The Court of Appeals indeed gave lip service to the "clearly erroneous" standard, (Slip Opinion, p. 6), but did not apply it. Rather, it mischaracterized the trial court's conclusions

and itself concluded that the trial court formed "its conclusions on its perception of the subjective and leisurely attitude of the average citizen confronted by an authority of the law." (Slip Opinion, p. 5) This is simply not the case. It is true that Judge Cook noted the social pressures which were at work in the encounter, but he did not hold or even intimate that a citizen who was accosted by an agent "will never feel free to leave." But he did hold, and find, as a matter fact was that the petitioner actually believed that he was not free to leave, and that based on the totality of circumstances which he found (both expressedly and impliedly) that such a belief was reasonable, such as would be held by a reasonable person under the circumstances. The trial judge's remarks were accurate and appropriate in the context of his holding as a whole, and when that holding as a whole is examined it is clear that he applied the proper legal standard to facts which he found in the context of the particular case.

Nonetheless, it seems appropriate to note that implicit in the agents' conduct is an awareness that most citizens when approached, would stop, respond and "cooperate," and that if the defendant, or any person so approached ignored them, or declined to cooperation, that act alone would justify further pursuit or continued intervention; indeed, that was Special Agent Anderson's testimony in the trial court. (2 TR 33-34) It seems clear enough that law enforcement officers are chargeable with knowledge of the inevitable tendency of their activities, and, it seems proper to suggest that if an agent relies upon "socialization and psychological makeup" in order to effect a desired result, that common understanding regarding social conditioning and the like can properly be taken into account when attempting to assess not only the intent, but the effect of law enforcement conduct. Thus, for example, this Court has noted in the context of confession cases that police conduct which was designed to elicit responses based upon

social conditioning and the like would constitute "interrogation." See, *Rhode Island* v. *Innis*, 446 US 291, 303 (1980); *Brewer* v. *Williams*, 430 US 387 (1977) (the "Christian burial speech" case).

The point, however, is that the Court of Appeals simply misapprehended the nature of the trial court's ruling. The Court of Appeals was not merely wrong, however, but rather, gave insufficient weight to the essentially factual nature of the question of whether a Fourth Amendment seizure had occurred. This Court should grant certiorari in the case at bar not only to remedy the wrong done to the defendant in this particular case, but to clarify the nature of the proper inquiry with respect to the question of Fourth Amendment seizures and the proper standard of review of suppression orders such as that entered by the trial court in the instant case. The area of airport encounters is one which is currently engendering a great deal of litigation, and guidance in the area is appropriate. Additionally, because of the fact that the factual pattern in the case at bar is one which contains elements which frequently reoccur in airport cases, the case at bar is an appropriate vehicle for such rulings.

CONCLUSION

The trial court judge in finding that Agent Anderson's initial contact with petitioner constituted an investigatory stop, rather than a mere casual encounter, and was a "seizure" within the meaning of the Fourth Amendment was based upon the application of the correct legal standard to a uniquely factual finding. The factual findings of the trial judge were not clearly erroneous and were not found to be by the Court of Appeals. Rather, the Court of Appeals' decision represents a fundamental misconception of the nature of the trial court's ruling and of the proper standard of review of the essentially factual question of whether a seizure has occurred under the totality of the circumstances found in each case.

This Court should grant certiorari and reverse the decision of the Court of Appeals, and, in reversing, should make clear both the essentially factual nature of the question of whether a Fourth Amendment seizure has occurred and the limited nature of review of trial court findings with regard to that question.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v.

Criminal Action
No. 81-80317

DENNIS EDWARD COLLIS,
Defendant

MEMORANDUM OPINION

Defendant, Dennis Edward Collis, is charged with possession of approximately 594.18 grams (net) of cocaine with intent to distribute, a violation of Title 22, Section 841(a)(1), United States Code. He brings this Motion to Suppress Evidence which was seized at the time of his arrest. Specifically, Defendant seeks to suppress approximately 654.86 grams (gross weight) of cocaine which was seized during a warrantless search of a shoulder bag that he was carrying at the Detroit (Michigan) Metropolitan Airport [Airport] on June 4, 1981.

Evidentiary Hearings were held before this Court on October 14, 1981 and October 19, 1981.

On June 4, 1981, Special Agents, Thomas Anderson [Anderson] and Gregory Demmink [Demmink] of the Drug Enforcement Administration [DEA] were on duty at the Airport, observing passengers deplaning from Delta Airlines Flight 1132. One of the first passengers to disembark was

Defendant who was carrying a shoulder bag. He walked in a rapid manner from the gate area and down the concourse in the direction of the baggage claim area. Anderson followed Defendant, leaving Demmink at the gate to watch other passengers disembark. As Anderson followed him at a distance of thirty (30) feet, Defendant turned and looked at Anderson two or three times. Anderson follwed him through the concourse and down to the Delta Airlines baggage claim area. Defendant, upon reaching the baggage claim area, made eye contact with, and nodded in the direction of, a man, who shortly thereafter stood up and left through one door, while Defendant exited through another door. Anderson observed Defendant on the sidewalk outside of the terminal and observed the "other" man standing near a parked car.

Anderson then decided that he would question Defendant. He approached Defendant, touched him lightly to gain his attention, and identified himself orally and by a display of his credentials. Anderson asked Defendant if he could ask him some question. Defendant consented.

Anderson initially asked for identification from Defendant, who thereupon produced a Master Charge Card in his own name. When Anderson asked for an alternative form of identification, Defendant produced the Master Charge Card for a second time. Anderson, while retaining the charge card, then asked Defendant for his airline ticket. Defendant produced an airline ticket in his own name. Anderson, after noticing that Defendant had baggage claim stubs in his airline ticket envelope, asked Defendant whether he had checked any baggage. Defendant responded affirmatively, but explained that he had walked through the baggage claim area and outside the terminal to determine if his brother, who was to meet him, was waiting. Anderson asked Defendant whether the unidentified man, whom he had seen in the baggage claim area, was his brother. Defendant denied any knowledge of the unidentified man. Anderson again asked Defendant for additional

identification. Defendant told Anderson that his driver's license was in one of his checked bags. Anderson returned the Master Charge Card and the ticket envelope to Defendant.

At that point, Anderson noticed Defendant glancing towards the unidentified man. Defendant periodically asked Anderson "What's the problem?" However, other than identifying himself as a DEA Agent, Anderson did not explain the reason for his interest in Defendant. Throughout the exchange, Defendant appeared to be very nervous. Anderson asked Defendant whether he (Defendant) would accompany him (Anderson) to the baggage claim area so that an examination of the driver's license could be made. Defendant walked with Anderson to the baggage claim area, where they were met by Demmink. Anderson briefed Demmink of the events that had transpired and told him of his interest in Defendant, as well as in the unidentified man, who by that time, had returned to the baggage claim area.

While Anderson and Demmink stood by the baggage conveyor, waiting for Defendant's baggage to emerge, the unidentified man approached the group, and identified himself as a friend of Defendant. The second man took the shoulder bag from Defendant's shoulder. However, Demmink retrieved it and returned the shoulder bag to Defendant. When Anderson asked Defendant if the unidentified man was his brother, Defendant did not respond.

Defendant began to pace back and forth before the baggage conveyor belt. Anderson, anticipating that Defendant might attempt to leave the area, positioned himself between Defendant and the terminal doors. Nevertheless, Defendant bolted and ran for the terminal doors, with Anderson and Demmink in pursuit. Anderson observed Defendant turn left and run toward an adjacent parking lot which was surrounded by a cyclone fence, which ultimately blocked his path. Defendant threw his shoulder bag over the fence. He was then placed

under arrest. Defendant's shoulder bag was retrieved by a passing airlines employee, who placed it in the possession of Anderson and Demmink. Defendant and the retrieved shoulder bag were taken to the DEA Airport Office by Anderson and Demmink who searched the bag and found three or four plastic bags of white powder which field tested positive for cocaine. The white powder was later positively analyzed as cocaine by the DEA Regional Laboratory in Chicago. Defendant was then charged with violating the provisions of 21 U.S.C. § 841(a)(1).

Defendant argues that the evidence must be suppressed for two reasons. First, he argues that the confrontation with Anderson and Demmink at the Airport was a "stop" which was not predicated upon reasonable suspicion, *see, e.g., Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968), and that the evidence as a "fruit" of this stop, *see, e.g., Wong Sun* v. *United States*, 371 U.S. 471, 484-87 (1963). The Government maintains that no Fourth Amendment "stop" occurred at the Airport, or, alternatively, that the "stop" was justified by reasonable suspicion.

Second, Defendant argues that even if the first "stop" was proper, the evidence must be suppressed because the search of the luggage without a warrant violated his Fourth Amendment rights. *See, e.g., Arkansas* v. *Sanders*, 422 U.S. 753, 757-61 (1979); *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977). The Government responds by asserting that, even though Anderson and Demmink conducted a search of the shoulder bag without a warrant, no right of Defendant was violated because he had "abandoned" the bag, *Hester* v. *United States*, 265 U.S. 57 (1924). The respective positions of the parties will be outlined in greater detail in the paragraphs that follow.

Defendant contends that he was "seized," within the meaning of the Fourth Amendment, when Anderson approached him, touched him lightly to gain his attention,

and asked him if he would answer some questions. Defendant believes that he did not have a choice as to whether he should or should not answer Anderson's questions or comply with his wishes, because it was "obvious" that he was not free to continue on his way. Defendant argues that no clearer show of authority can be imagined than a display of credentials by a law enforcement official, coupled with a request to question a citizen. Defendant further asserts that a "great segment" of the population shares his belief that if a law enforcement official asks to talk with a citizen, the individual will not be permitted to leave until the questions have been answered. Defendant asserts that the fact that Anderson and Demmink never specifically informed him that he could decline to speak with them not only underscores his testimony about Anderson's intentions, but it is significant in determining the nature of the assertion of authority involved.

Defendant asserts that "(i)t is clear that if this initial contact constituted a 'seizure,' and if that seizure was improper, then nothing which occurred thereafter is untainted by the initial impropriety, because all of the information gained thereafter — the Defendant's apparent nervousness, the conduct of the other person, the attempt to divert the shoulder bag and the Defendant's flight — all flowed from the initial seizure."

Defendant also argues that "it is clear that ... Anderson did not have a sufficient basis to effect a *Terry* stop of the Defendant when he did." Defendant notes that such a seizure is justified only on the basis of a "reasonable and articulable suspicion that the person seized is engaged in criminal activity," and not an "inchoate and unparticularized suspicion or 'hunch,'" *citing Reid* v. *Georgia*, 448 U.S. 439, 440-41 (1080). Defendant contends that Anderson's decision to approach him was based on six distinct facts and circumstances; to wit, (1) Defendant exited a flight which originated in Miami, a "source" city; (2) Defendant was one of the first people to

disembark from the plane, presumably after traveling first class; (3) Defendant walked from the gate area and down the concourse in a rapid fashion; (4) Defendant was not dressed like a business man, and appeared to have been up all night; (5) Defendant turned around and looked at Anderson, who was following him on two or three occasions; and (6) in the baggage area, Defendant made eye contact with, and nodded to, an unidentified man, who left his seat and exited through a door which was different from that which Defendant exited.

Defendant asserts that common sense and the case law makes it clear that none of these circumstances, taken separately or collectively, justify Anderson's actions. Defendant argues that the objective facts which Anderson observed at the Airport were neutral on their face, and were not suggestive of criminality. Defendant further asserts that it would be a dangerous precedent to permit a law enforcement official to interrupt citizens in their comings and goings on the basis of that agent's suspicions regarding such subtleties of human interaction as eye contact and nodding.

Defendant denies that he abandoned his shoulder bag by throwing it over the parking lot fence. Defendant contends that, by this action, he did not evince an attempt to relinquish his interest in the property, as would be required for a finding that he "abandoned" the property, *United States* v. *Colbert*, 474 F.2d 174 (5th Cir. 1973). Rather, he argues, his acts represented a futile attempt to do whatever he could in order to maintain whatever privacy interests that he may have had in the bag. Defendant concludes that since he did not "abandon" the bag, and if the Court finds that Anderson did not "seize" or "stop" Defendant, or that the "seizure" or "stop" was unlawful in the first instance, the subsequent retrieval and search of the bag must be deemed to have been an unlawful warrantless search and the evidence found in the bag must be suppressed. Defendant notes that since the

shoulder bag was clearly the kind of luggage or repository for personal property which is entitled to protection under the warrant requirement of the Fourth Amendment, under the cases of *United States* v. *Chadwick*, 433 U.S. 1 (1977) and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), the Court must hold that the subsequent warrantless search of the bag was unlawful, and the evidence which was discovered under that search must be suppressed.

The Government notes that the question of when an investigative stop amounts to a seizure was addressed in *United States* v. *Jefferson*, 650 F.2d 854 (6th Cir. 1981). In that case, the United States Court of Appeals for the Sixth Circuit applied the test, which had been set forth in *United States* v. *Mendenhall*, 446 U.S. 554 (1980) in determining whether a law enforcement official had "seized" the Defendant. That test, according to Justice Stewart, was that "a person has been seized within the meaning of the Fourth Amendment only if, in veiw of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The Government asserts that the instant case is distinguishable from *Jefferson, supra,* where the Defendant was accosted, ordered to accompany law enforcement officials to their office, and told that while he could refuse to consent to a search of his bags, the official would obtain a warrant if he did so, and proceed with the search. The Government concedes that the confrontation in *Jefferson, supra,* was a "seizure," because the Defendant was not given any choice in whether to accede to the officials' requests.

The Government notes that Anderson returned the Master Charge Card and the airline ticket envelope to Defendant after viewing them, which suggested that "there was not a problem immediately apparent." Anderson used no physical force to gain Defendant's attention, or to persuade Defendant to accompany him into the terminal. Anderson displayed no

weapon, and spoke to Defendant in a normal tone of voice at all times. The Government submits that Defendant was not "seized" by Anderson, because his freedom of movement was not restricted by Anderson and he accompanied Anderson inside the building "in a cooperative frame of mind."

The Government submits that Anderson's contact with Defendant was justified as a permissible investigative stop on the basis of Defendant's suspicious behavior. The Government says that, in *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Supreme Court held that a "stop and frisk" amounts to a "seizure," and that there must be specific articulable facts that lead to rational inferences of criminal activity before the seizure is reasonable. In *Terry, supra,* the Court determined that the observations of the officer coupled with his many years of experience made his activities reasonable. The Government contends that the instant case is similar to *Terry, supra,* in that Anderson, an experienced law enforcement official in spotting suspects at the Airport, observed behavior that he believed to be indicative of drug transporting. The Government concedes that, at the time of Anderson's observation of Defendant's contact with the unidentified man, he did not have probable cause to arrest Defendant. However, the Government argues that Anderson, at that time, did have sufficient cause to justify stopping the Defendant to verify his identity. The Government asserts that the investigative stop involved in the instant case was reasonable under the circumstances.

The threshold question is under what circumstances may it be concluded that the actions of the agents constituted a "seizure" of Defendant. As the Supreme Court noted in *Terry v. Ohio, supra,* "obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen

may we conclude that a 'seizure' has occurred." *Terry, supra* at 19. Judge Pratt of this Court determined, in *United States v. Coleman,* 450 F. Supp. 433 (E.D. Mich. 1978), "police officers are not called upon to discard all vestiges of courtesy and friendliness, of civility and humanity, nor are they to be prohibited from addressing inquiries to private nonsuspect persons in the course of normal investigations." At a certain point, however, the line which separates mere contact from an investigative stop is crossed and, at that point, the protective operation of the Fourth Amendment is triggered. Whether a person's liberty has been restrained or not is to be judged not according to "what the Defendant himself . . . thought, but what a resonable man, innocent of any crime, would have thought had he been in the Defendant's shoes." *Coates v. United States,* 413 F.2d 371 (D.C. Cir. 1969), *citing United States v. McKethan,* 247 F. Supp. 324 (D. D.C. 1965).

While the restraint exercised against Defendant in the instant case was not as forcible as that to which the appellant had been subjected in *Terry, supra,* the Court is of the opinion that from the moment Anderson identified himself with a display of credentials and began to ask questions of Defendant outside of the terminal, a *Terry, supra,* "stop" had been effected. Defendant could have ignored Anderson, or expressed his belief that he did not have to respond to questions. As Judge Pratt noted in *Coleman, supra,* however, "such conduct . . . would have been, at the very least, a breach of etiquette, an act of discourtesy and incivility which would not be expected of the ordinary, reasonable person innocent of crime," *Coleman, supra,* at 439. This Court determines that, as a matter of law, Defendant's belief that he was not free to leave when approached by Anderson, and that he was not free to refuse to answer the agent's questions, were reasonable beliefs which are held by reasonable citizens under these circumstances. Within the meaning of the Fourth Amendment, Anderson did

"seize" Defendant outside of the terminal. The Court must now determine whether the "seizure" of Defendant's person was "reasonable," within the meaning of the Fourth Amendment.

This case arises out of the efforts of law enforcement officials to effectively stem the tide of narcotics and other controlled substances which flow into Michigan through the Airport. Although Anderson and Demmink eschewed reliance on the so-called "drug courier profile" which had been utilized in earlier cases, the issues presented in this case are similar to those presented in any case involving reliance by the DEA on such a profile.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." Their is no question that Defendant, in this case, possessed this constitutional right of personal security as he walked through the Airport, as "the Fourth Amendment protects people, not places," *Katz v. United States,* 389 U.S. 347, 351.

The Fourth Amendment requirement that searches and seizures must be founded upon an objective justification, governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest." *Davis v. Mississippi,* 394 U.S. 721 (1969); *Terry v. Ohio,* 392 U.S. 1, 16-19 (1968); *United States v. Brigoni-Ponce,* 422 U.S. at 878. Accordingly, if the Defendant was "seized" when Anderson approached and asked questions of him, the agent's conduct was constitutional only if he had reason to suspect Defendant of wrongdoing.

The case of *Terry v. Ohio,* 392 U.S. 1 (1967) established that a stop may be justified on less than full probable cause if it does not violate the general proscription against unreasonable searches and seizures, 392 U.S. at 20. The Court went on, in

Terry, supra, to define "reasonableness" in the context of an "on the scene stop":

> In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which taken together with rational inferences from those facts reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunchs, a result this Court has consistently refused to sanction.

392 U.S. at 22-23.

In *Adams v. Williams,* 407 U.S. 143 (1971), the Court expanded somewhat on the parameters of police activity justified by *Terry, supra.* In upholding a stop and frisk on the basis of an informant's tip, the Court stated:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work

> to adopt an intermediate response . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

407 U.S. at 145-46.

Both *Terry, supra,* and *Adams, supra,* involved instances in which the police had reason to suspect that the person stopped was armed and contemplating criminal activity. The "reasonableness" approach, however, has been extended to instances in which the public safety demands some minimal intrusion, such as the use of an airport magneometer. Both the Fifth and the Second Circuits have considered a series of cases in which airport security officers conducted warrantless searches of suspected skyjackers. In *United States v. Moreno,* 475 F.2d 44 (5th Cir. 1973), the Fifth Circuit applied the rationale of *Terry, supra,* to uphold an airport stop of an individual who had been observed for several hours behaving in a suspicious manner. In *United States v. Skipworth,* 482 F.2d 1272 (5th Cir. 1973), the Court expanded on the balancing of interests underlying *Moreno, supra,* and went on to emphasize that the intrusion of the airport search is somewhat mitigated by (1) the option of the passenger to avoid the search by choosing not to board the plane and (2) the conduct of the search in the public view.

The Second Circuit has similarly upheld a number of airport searches and seizures under the reasonableness clause of the Fourth Amendment. *United States v. Bell,* 464 F.2d 667 (2d Cir. 1972); *United States v. Riggs,* 474 F.2d 699 (2d Cir. 1973). In *United States v. Ruiz-Estrella,* 481 F.2d 723 (2d Cir. 1973), however, the Court agreed to suppress the evidence which had been gleaned from the search of a suspect who fit the skyjacking profile and had produced a marginally questionable identification. The Court stated that these facts did

not constitute "compelling circumstances" to justify the search of the passenger's bag, 481 F.2d at 729. Furthermore, if one of the mitigating factors, which support airport searches is the passenger's awareness that he can avoid the search by choosing not to board the aircraft, then this Defendant's awareness of such an option further tainted the search.

However, the airport searches do warrant a cautionary note. While public safety demands some intrusion into the privacy of air passengers, some reasonable suspicion of illegal activity is required before a passenger may be lawfully subjected to a search. Moreover, the drug enforcement program at the Airport is not supported by the same concerns for public safety which underlie the anti-skyjacking measures. In an Opinion involving the airport program, Judge Joiner of this Court observed:

> As damnable as drug traffic is, its regulation involves the protection of no special public interests like those at play in airport security. Regulation of drug traffic is achieved through enforcement of laws adopted by Congress which are similar to laws prohibiting bank robbery, bribery, or conspiracy. Thus, the court perceives no fundamental public interest at stake in routine enforcement of the drug laws which calls for the development of rules unique to airport drug searches. Accordingly, the government's rights in these cases must be tested against basic Fourth Amendment principles rather than by rules derived from an air pracy context.

United States v. Van Lewis, 409 F. Supp. 535, 542 (E.D. Mich. 1976).

The border search cases present another area which bears upon the reasonableness of the stop and search program of drug enforcement officials. While a number of courts have

considered the problems that have been raised in border searches in recent years, those issues were most cogently resolved in *United States v. Brigoni-Ponce, supra.*

While section 287(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(1) authorizes warrantless interrogations of "any alien or person believed to be an alien as to his right to be or remain in the United States," the Court held in *Brigoni-Ponce, supra,* that the Fourth Amendment does not allow a roving patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status when the only ground for suspicion is that the occupants appeared to be of Mexican ancestry. The Court discussed at length the potential intrusion on normal traffic which would accompany a program of random steps:

> We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving patrol stops. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving patrol stops of all vehicles in the border area,

> without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.

422 U.S. at 882.

Furthermore, the Court declined to approve even a limited identification stop unless the Border Patrol could point to specific factors indicating that the person in question might be an alien:

> The Government also contends that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens for questioning about their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration ... authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their eight to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than reasonable suspicion that they may be aliens.

422 U.S. at 883-84.

Even at an international border, the Fourth Amendment prohibits identification stops by roving patrols which are not based upon an articulable suspicion of illegal activity. Even

the very serious nature of illicit drug traffic cannot justify an identification stop in the absence of reasonable grounds to believe that the person in question is a drug courier.

The Supreme Court recently stated that such a seizure is justified only on the basis of "a reasonable and articulable suspicion that the person seized is engaged in criminal activity," and not an "inchoate and unparticularized suspicion or 'hunch,'" *Reid v. Georgia,* 448 U.S. 438, 440-41 (1980).

According to Anderson's testimony, his decision to stop Defendant was based upon a number of supposed facts and circumstances, *see,* Memorandum Opinion, *supra,* at 1-2. This Court believes that none of these factors provide a legitimate basis for "reasonable suspicion" which is sufficient to justify the seizure of Defendant outside the terminal building.

As an example, the fact that the plane from which Defendant disembarked came from Miami, a "source" city, is of little moment. In *United States v. Andrews,* 600 F.2d 563, 566-67 (6th Cir. 1979), where the "source" city was Los Angeles, the Court noted that "such a flimsy factor should not be allowed to justify — or help justify — the stopping of travelers from the nation's third largest city."

That Defendant was among the first to disembark is also of little importance, especially in light of the fact that DEA agents, in other cases, have considered (1) the last passenger to disembark as an indicia of criminal conduct, *United States v. Vasquez,* 612 F.2d 1338 (2d Cir. 1980), (2) one of the middle of a line of deplaning passengers, *United States v. Buena Ventura-Airza,* 615 F.2d 29 (2d Cir. 1980) or (3) a passenger who disembarked after three quarters of the other passengers.

All of the factors, which were relied upon by Anderson, were neutral. However, none of these factors were indicative of criminology or independently significant. *See United States v. Prince,* 548 F.2d 164 (6th Cir. 1977), where the United States Court of Appeals for the Sixth Circuit determined that certain facts, when evaluated collectively, warranted the belief that the Defendant had committed or was committing the offense of possessing narcotics. This record if barren of any facts which are essential to a determination of a "reasonable suspicion" which is a prerequisite to a valid *Terry, supra,* stop.

Law enforcement officials cannot satisfy the "reasonable suspicion" test of *Terry, supra,* by relying upon neutral factors as was done in the instant case. This Court is of the opinion that any number of factors might support a determinaton of "reasonable suspicion" that would justify the type of investigative stop involved in this case. However, the Court is also aware of the need to protect the rights of innocent persons from the unwarranted intrusion by governmental officials. Those factors, upon which law enforcement officials may rely in order to justify an investigative stop, must be: (1) sufficiently specific so that they are not susceptible to manipulation by law enforcement officials, and (2) sufficiently probative of criminal activity so that they will not ensnare innocent citizens and subject them to unwarranted investigative stops.

Accordingly, this Court is of the opinion that Anderson did not have a sufficient legal basis upon which to effect a *Terry, supra,* stop of Defendant. Furthermore, cocaine, which was confiscated by Anderson and Demmink at the Airport must be suppressed under the exclusionary rule, as set forth in *Mapp v. Ohio,* 367 U.S. 643 (1961) because the discovery of the contraband was a "fruit" of the unlawful stop effected by

Anderson and Demmink, *Wong Sun v. United States,* 371 U.S. 471 (1963).

So Ordered.

/s/ JULIAN ABELE COOK, JR.

JULIAN ABELE COOK, JR.
United States District Judge

I hereby certify that the foregoing is a true copy of the original on file in this Office.

U.S. DISTRICT COURT
EASTERN DISTRICT
OF MICHIGAN

By/s/ PATRICIA A. FUNNI

Dated: December 23, 1981
Detroit, Michigan

APPENDIX B

No. 82-1127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DENNIS EDWARD COLLIS,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed February 16, 1983

Before: LIVELY and KRUPANSKY, Circuit Judges and CECIL, Senior Circuit Judge*

KRUPANSKY, Circuit Judge. This is an appeal from an Order of the District Court for the Eastern District of Michigan suppressing 654.86 grams (gross weight) of cocaine relating to the criminal prosecution of Dennis Edward Collis (Collis) for possession with intent to distribute a controlled substance. 21 U.S.C. § 841(a)(1). The matter is properly before this Court pursuant to 18 U.S.C. § 3731.[1]

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* The Honorable Lester L. Cecil died prior to final resolution of this matter.

[1] 18 U.S.C. § 3731 provides, in pertinent part:
An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or

The factual findings of the lower court, entered following a two-day evidentiary hearing, reveal the following sequence of events. On June 4, 1981, Special Agents Thomas Anderson (Anderson) and Gregory Demmink (Demmink) of the Drug Enforcement Agency (DEA) were conducting surveillance at the Detroit Metropolitan Airport. The agents were monitoring flights arriving from Miami, Florida because of that city's reputation as a narcotics "source city."

In the course of their surveillance, the agents noticed Collis deplane from Delta Airlines Flight 1132 which had originated in Miami. Collis, carrying a shoulder bag, was one of the first passengers to disembark. He proceeded rapidly from the gate toward the baggage claim area.

Anderson followed Collis while Demmink remained at the gate to monitor the remaining passengers off-load. Anderson noted that Collis turned to look at him on several occasions as defendant proceeded through the airport concourse to the baggage claim area. As he arrived at the baggage claim area Collis nodded to an unidentified male who, shortly thereafter, departed from the terminal while Anderson left through another exit. Outside the terminal Anderson observed Collis walking on the sidewalk and the unidentified male standing beside a nearby parked car.

At this point Anderson elected to question the defendant. Anderson approached Collis from behind, lightly tapped him on the arm, displayed his credentials and orally identified himself as a DEA agent. Anderson requested permission to question Collis who willingly consented.

Upon further inquiry, Collis produced a Master Charge Card for identification and an airline ticket. Noting that

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excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

baggage claim checks were attached to the ticket folio, Anderson asked Collis if he had checked any luggage. Collis acknowledged that he had, but explained that he had left the terminal before retrieving his luggage to determine if his brother had arrived to meet him. Anderson asked Collis if he knew the unidentified male standing by the parked vehicle. Collis denied knowing him. Anderson requested Collis to produce additional identification but defendant asserted that his driver's license was in his checked luggage. Anderson returned the Master Charge Card and ticket envelope to the defendant and asked if defendant would agree to accompany him to the baggage claim area. Collis readily complied. At the baggage claim area, Anderson and Collis were met by Demmink. Anderson related the transpired events to Demmink including reference to the unidentified male who had also returned to the baggage claim area.

As Anderson, Demmink and Collis were waiting for defendant's baggage, the unidentified man approached and identified himself as a friend of Collis. He thereupon removed the shoulder bag from Collis which was retrieved by Demmink and immediately returned to defendant.

After anxiously pacing back and forth near the baggage conveyor belt, Collis bolted through the terminal doors and, with Anderson and Demmink in pursuit, ran into an adjacent parking lot. The parking lot was enclosed by a cyclone fence which blocked Collis' escape. Before Anderson and Demmink could reach him, Collis heaved the shoulder bag over the fence and onto a concrete ramp. Thereafter, Collis was placed under arrest and the bag was recovered, searched and found to contain cocaine.

On defendant's motion, the district court suppressed the evidence recovered from the shoulder bag. The lower court concluded that Anderson "seized" Collis when Anderson displayed his credentials and requested permission to question him; that this seizure was not supported by reasonable suspi-

cion; and that the subsequent discovery of the contraband was the fruit of the unlawful seizure. The government instituted this appeal.

The sole issue before this Court is whether Anderson's initial encounter with Collis constituted a "seizure" within the purview of the Fourth Amendment. The Court would observe initially that the lower court properly noted that the appropriate test for determining a "seizure" was enunciated by Justice Stewart in *United States* v. *Mendenhall*, 446 U.S. 544, 554-55 (1980):

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

(citations and footnote omitted). *See United States* v. *Tolbert*, No. 81-1485 (6th Cir. Nov. 11, 1982); *United States* v. *Moore*, 675 F.2d 802 (6th Cir. 1982); *United States* v. *Jefferson*, 650 F.2d 854 (6th Cir. 1981).

The *Mendenhall* test directs a district court addressing a "seizure" issue to consider, assess and underpin its decision on objective facts.[2] The lower court, however, elected to

[2] *United States* v. *Mendenhall*, *supra*, also involved an encounter in an airport. Subsequent to observing that the confrontation occurred in the public concourse, with the agents in civilian dress who did not display weapons and merely approached the defendant and inquired to see her ticket and identification, Justice Stewart concluded that "nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way." 446 U.S. at 555 (emphasis added).

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frame its conclusions on its perception of the subjective illusory attitude of the average citizen confronted by an authority of the law:

> [T]he Court is of the opinion that from the moment Anderson identified himself with a display of credentials and began to ask questions of Defendant outside of the terminal, a *Terry* [v. *Ohio*, 392 U.S. 1 (1968)] "stop" had been effected. Defendant could have ignored Anderson, or expressed his belief that he did not have to respond to questions. As Judge Pratt noted in *[United States* v.] *Coleman* [450 F.Supp. 433, 439 (E.D. Mich. 1978], however, "such conduct . . . would have been, at the very least, a breach of etiquette, an act of discourtesy and incivility which would not be expected of the ordinary, reasonable person innocent of crime."

The trial court, in effect, imposed a per se rule declaring every contact between a citizen and law enforcement officer a "seizure". Such a rule is without support. As Justice Stewart noted, it is not "enough to establish a seizure that the person asking the questions [is] a law enforcement official." *United States* v. *Mendenhall*, *supra* at 555. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry* v. *Ohio*, 392 U.S. 1, 34 (1968) (White, J. concurring).

The average citizen may well elect to stop and respond to inquiries of a law enforcement officer, compelled, perhaps, by a desire to assist the officer in the prevention of crime or, as noted by the lower court, bound by a sense of common courtesy. In neither instance however is the citizen actually or constructively restrained by the authority of the officer.

A per se rule ignores the reality that "[s]treet encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or

loss of life." *Terry* v. *Ohio*, *supra*, at 13. Each encounter must be considered within its factual parameters as impacted by the *Mendenhall* pronouncements. It necessarily follows that generally this determination is a factual finding which will not be disturbed unless clearly erroneous. *United States* v. *Black*, 675 F.2d 129 (7th Cir. 1982); *United States* v. *Patino*, 649 F.2d 724 (9th Cir. 1981). The Court would hasten to add, however, that unless some objective fact discloses that a reasonable person would have felt restrained, "otherwise inoffensive contact between a member of the public and the police cannot, *as a matter of law*, amount to a seizure of that person." *United States* v. *Mendenhall*, *supra* at 555 (emphasis added).

Indeed, viewing the lower court's finding of fact without ascribing an overwhelmingly coercive effect to the mere status of the agent *qua* agent, this Court is constrained to conclude, *as a matter of law*, that the initial encounter in this matter did not amount to a seizure. Anderson approached Collis alone and merely inquired of him if he would object to answering certain questions. The lower court found that Collis readily consented to this request. There is no indication that Anderson employed a threatening tone of voice, displayed a weapon or in any fashion assumed an authoritarian or overbearing manner.

The circumstances of this encounter are indistinguishable from *United States* v. *Moore*, *supra*. In *Moore* the agents approached the suspect as he was entering the taxi line at the airport. The agent displayed his credentials and requested permission to pose some questions. The suspect voluntarily responded to the questions and also consented to a search of his briefcase. The inquiry and search of the briefcase developed probable cause for the agents to arrest the suspect and in "patting him down" cocaine was discovered in his coat pocket. This Court concluded that the initial "non-threatening" approach was not a seizure and upheld the

legality of the agents' conduct. *See also United States* v. *Tolbert, supra.*

The appellee would attempt to distinguish *Moore* by emphasizing that in the instant matter the agent touched Collis. While such a fact is pertinent, the district court specifically found that Anderson merely "touched [Collis] lightly to gain his attention."

In sum, nothing in the lower court's findings would indicate that a reasonable person under similar circumstances would not have felt free to ignore Anderson and proceed on his way. Accordingly, the lower court's suppression order must be reversed.

This Court would observe, however, that the lower court, in finding that a seizure had occurred at the initial confrontation, foreclosed consideration of the constitutional significance, if any, of the agent's subsequent conduct in requesting Collis to accompany him to the baggage conveyor. Because the district court's factual account of this aspect of the episode does not permit this Court to presently determine whether a seizure occurred at that juncture, *compare United States* v. *Mendenhall, supra, and United States* v. *Moore, supra, with United States* v. *Jefferson, supra,* the matter is remanded for resolution of this issue in accordance with this Opinion. The district court may also consider, if necessary, whether Collis, in heaving his shoulder bag over the fence, effectively abandoned an interest in the carrying case.

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FILED
MAY 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1694

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS EDWARD COLLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1694

DENNIS EDWARD COLLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the district court's order suppressing evidence obtained in a search of his shoulder bag.

On July 9, 1981, petitioner was charged in an indictment returned in the United States District Court for the Eastern District of Michigan with possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). On December 23, 1981, the district court suppressed the cocaine, which was found in petitioner's shoulder bag after he had thrown it over a fence during an unsuccessful attempt to flee from federal Drug Enforcement Administration (DEA) agents. The ground for suppression was that discovery of the contraband was a fruit of an illegal seizure of his person by a DEA agent during his initial encounter with the agent on June 4, 1981, at the Detroit airport (Pet.

App. 1a-18a). The court of appeals reversed, applying the test for distinguishing seizures from consensual contacts set forth in Justice Stewart's opinion in *United States* v. *Mendenhall*, 446 U.S. 544, 554-555 (1980), and concluding that petitioner had not been seized during his initial encounter with the agent. The court of appeals remanded the case to the district court for a determination whether the conduct of DEA agents during later phases of petitioner's encounter with them — which the district court had found it unnecessary to consider — gave rise to an illegal seizure, and, if necessary to a decision in the case, to consider whether petitioner, in throwing his shoulder bag over the fence, effectively abandoned all interest in the bag (Pet. App. 1a-7a).

Petitioner contends (Pet. 6-15) that the district court applied the correct legal standard to the facts of this case as it found them, and that the court of appeals improperly reviewed those findings de novo rather than under the clearly erroneous standard of review. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioner in prescisely the same position he would have occupied if the district court had rejected his contention that his initial encounter with the DEA agent constituted an unlawful seizure. Petitioner is free on remand to pursue his alternative contentions in support of his suppression motion. If that motion is granted his present contentions will be moot. If that motion is denied and petitioner is acquitted following a trial on the merits, his contentions will also be moot. Alternatively, if petitioner's suppression motion is

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[1]It is now 22 months since the return of the indictment and almost 17 months since the district court's suppression order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioner.

denied and he thereafter is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1983

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[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We note here only that the test for determining whether a seizure has transpired enunciated by Justice Stewart in *Mendenhall*, applied here by the court of appeals, was endorsed by a majority of this Court in *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5-6, 10 (opinion of White, J.); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting). Because the court of appeals decided only that petitioner's initial encounter with the agents was not a seizure and left open upon remand the question whether subsequent phases of that encounter entailed a seizure of petitioner's person, the court of appeals' decision is fully consistent with this Court's decision in *Royer*. (Indeed, petitioner does not suggest otherwise.) Moreover, on remand the district court will be guided by the teaching of *Royer*. Accordingly, *Royer* provides no occasion for further consideration of the question decided by the court of appeals.

We will file a response on the merits if the Court so requests.